K.D.

ORIGINAL

NO. 81-5400

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
OCT 10 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LACEY G. STANLEY, JR.
APPELLANT

VS.

SARAH W. STANLEY,
APPELLEE

MOTION TO DISMISS

David B. Hamilton
Counsel for Appellee

OF COUNSEL:

FARRIS, MALLARD & UNDERWOOD, P.A.
1700 Southern National Center
Charlotte, North Carolina 28202
Telephone: 704/372-9110

10

INDEX

I. STATEMENT OF FACTS 2

II. ARGUMENT 4

A. THE QUESTIONS RAISED BY APPELLANT IN HIS JURISDICTIONAL STATEMENT WERE NOT TIMELY OR PROPERLY RAISED HERETOFORE AND HAVE NOT BEEN EXPRESSLY PASSED ON BY ANY TRIBUNAL 4

B. THE ISSUES NOW RAISED BY APPELLANT IN HIS JURISDICTIONAL STATEMENT HAVE BEEN RENDERED MOOT BY CHANGES IN NORTH CAROLINA LAW 7

C. THE ORDER OF THE TRIAL COURT RESTS ON WELL RECOGNIZED PRINCIPLES OF NORTH CAROLINA LAW WHICH ARE NOT VIOLATIVE OF ANY CONSTITUTIONAL IMPERATIVE 7

D. THE CONSTITUTIONAL ISSUES RAISED IN THE JURISDICTIONAL STATEMENT ARE NOT SUBSTANTIAL 9

III. CONCLUSION 10

IV. APPENDIX A - Appellee's Motion to Dismiss and Response to Petition for Discretionary Review

APPENDIX B - Appellant's Brief - North Carolina Court of Appeals

NO. 81-5400

IN THE SUPREME COURT OF THE UNITED STATES

LACEY G. STANLEY, JR.	)
	)
APPELLANT	)
	)
VS.	)
	)
SARAH W. STANLEY	)
	)
APPELLEE	)

MOTION TO DISMISS

Sarah W. Stanley, Appellee, through her attorneys, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the Jurisdictional Statement of Lacey G. Stanley, Jr., Appellant, heretofore filed in this cause, and as grounds therefor, Appellee shows the Court as follows:

I. STATEMENT OF FACTS

Appellee instituted this action against Appellant on October 8, 1979. Appellee's complaint requested, among other things, that judgment be entered against Appellant in an amount sufficient to reimburse Appellee for Appellant's share of the costs incurred by her for the support and maintenance of the minor child born of the marriage of the parties (the "child") for a period of three (3) years preceding the institution of this action, and for an award of prospective child support.

The evidence presented to the trial court established that Appellant, after paying nominal sums to Appellee for the support of the child for a short period after the child's birth, paid nothing to Appellee for the support of such child after 1966 (Rpp 32, 43).[1] This failure of support existed despite the fact that Appellant was at most times employed and, in fact, at times earned as much as $1,500 per month (Rp 42). Further, the

---

1. References are to the record on appeal in the North Carolina Court of Appeals.

evidence established that Appellant evidenced a course of conduct whereby he was constantly moving, and changing his residence and employment (Rp 42). As a result of Appellant's constant moves and his refusal to inform Appellee of his whereabouts, Appellee was never able to bring Appellant into court and attempt to require him to fulfill his obligations as the child's father.

The evidence further established that Appellee had expended in excess of $400 per month for the support of the child for the three-year period preceding the intiation of this action, and that Appellee had incurred extraordinary medical expenses on behalf of the child, a portion of which would not be covered by insurance (Rpp 33-34, 55-56, 64). Similarly, the evidence established that Appellee was expending a similar amount for the support of the child at the time of the trial of this matter (Rpp 34-35, 51-56).

Based upon the evidence presented, the trial court made extensive findings of fact to support both its judgment of reimbursement in favor of Appellee and its award of prospective child support. The findings of fact, among other things, considered those amounts actually expended by Appellee for the support of the child for the three-year period preceding the initiation of this action for which she was entitled to reimbursement from Appellant as his "fair share of support for that period of time" (Rp 64). These findings further stated that Appellant had not made sufficient efforts to find employment and pay to Appellee a reasonable sum for the support of the child, and that Appellant's failure to exercise sufficient effort to find employment and to exercise his earning capacity was in disregard of his obligation to provide reasonable support for the child (Rp 65). These findings further considered the amount of prospective child support which Appellant was to pay to Appellee for the support of the child.

Based upon these and other findings of fact, the trial court entered a judgment in favor of Appellee and against Appellant in the amount of $14,400 by way of reimbursement and further awarded Appellee the sum of $200 per month as prospective child support,

which matters were contained in the Order of the trial court filed January 9, 1980 (hereinafter the "Order") (Rpp 64-68).

From this Order Appellant appealed to the North Carolina Court of Appeals. After considering the record on appeal and the briefs and arguments of counsel, the North Carolina Court of Appeals, on March 17, 1981, entered an opinion affirming the decision of the trial court. From this decision Appellant filed a Notice of Appeal and Petition for Discretionary Review with the North Carolina Supreme Court. On June 8, 1981, the North Carolina Supreme Court dismissed Appellant's appeal and denied his Petition for Discretionary Review. Thereafter, Appellant filed Notice of Appeal with the United States Supreme Court.

II. ARGUMENT

A. THE QUESTIONS RAISED BY APPELLANT IN HIS JURISDICTIONAL STATEMENT WERE NOT TIMELY OR PROPERLY RAISED HERETOFORE AND HAVE NOT BEEN EXPRESSLY PASSED ON BY ANY TRIBUNAL.

A review of the record in this cause unmistakably demonstrates that the issues now being raised by Appellant were neither presented to nor considered by the trial court or the North Carolina Court of Appeals. While Appellant asserts that the constitutional issues which he now propounds were preserved, the record clearly shows that at no time was any mention made of these issues until Appellant raised them in support of his Notice of Appeal and Petition for Discretionary Review with the North Carolina Supreme Court.[2] It is submitted that this failure on the part of Appellant to raise these issues before both the trial court and the North Carolina Court of Appeals precludes his now asserting them before the United States Supreme Court.

This appeal is based upon 28 U.S.C. Section 1257(2). This statute allows judgments to be reviewed by this Court where there is drawn in question the validity of a statute of any state on

---

2. This same argument was raised before the North Carolina Supreme Court in Appellee's Motion to Dismiss and Response to Petition for Discretionary Review filed in response to Appellant's Notice of Appeal and Petition for Discretionary Review. Apparently the North Carolina Supreme Court agreed with this position, as Appellant's appeal was dismissed and his Petition for Discretionary Review was denied. A copy of Appellee's Motion to Dismiss and Response to Petition for Discretionary Review is attached as Appendix A.

the ground of its being repugnant to the Constitution, and the decision of the state court is in favor of the validity of the statute. Yet no tribunal to date has been asked to consider the validity of N.C. Gen. Stat. Section 50-13.4, the statute whose constitutionality Appellant has questioned.

The record on appeal is devoid of any evidence that Appellant raised any constitutional issues before the trial court. Appellant lamely suggests that these issues were preserved as a result of his filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[3] However, this assertion is both factually and legally incorrect. The record on appeal reflects the factual absence of any such argument by Appellant. Moreover, under North Carolina law, as reflected by the North Carolina Court of Appeals in its opinion in this cause, a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure would not cause a dismissal on such constitutional grounds.[4]

Moreover, there was no argument or discussion before the North Carolina Court of Appeals by Appellant of the issues he now raises before this Court. While Appellant listed several assignments of error relating to alleged constitutional issues, the brief which he filed with the North Carolina Court of Appeals contained no argument or discussion of the matters contained in his Jurisdictional Statement presented to this Court.[5] The only reference to constitutional issues contained in Appellant's Brief can be found in Section B of his argument, where Appellant asserted that "the trial court erred and violated (Appellant's) constitutional rights to due process of law and equal protection of the law by awarding back child support payments in the amount

---

3. Appellant's Jurisdictional Statement at p. 6 (hereinafter "Jurisdictional Statement").

4. The citation for the reported decision of the North Carolina Court of Appeals in this cause is Stanley v. Stanley, 51 N.C. App. 172, ____ S.E.2d ____ (1981). See also, N.C. Gen. Stat. Section 1A-1, Rule 12(b)(6).

5. A copy of Appellant's Brief with the North Carolina Court of Appeals is attached as Exhibit B, and is hereafter referred to as "Appellant's Brief."

of $14,400 based upon insured medical expenses and no showing of (Appellant's) ability to pay." Appellant's Brief at pp. 4-5. In support of this contention, Appellant argued that the trial court considered the same evidence for both its award of reimbursement and its order requiring Appellant to pay prospective child support. Under these alleged circumstances, Appellant asserted, "Therefore, it is unconstitutional as a violation of due process of law and equal protection of the law to impose upon (Appellant) an obligation to reimburse (Appellee) for more child support than he would logically have been required to pay as present child support." Appellant's Brief at p. 5.

The foregoing are the sole statements in Appellant's Brief supporting his "constitutional" assignments of error submitted to the North Carolina Court of Appeals. There is nothing else in the record nor in Appellant's Brief, nor anywhere else, which raises the issues Appellant now asks the United States Supreme Court to consider.[6]

As noted, it was only when Appellant filed his Notice of Appeal and Petition for Discretionary Review with the North Carolina Supreme Court that arguments even remotely similar to those now being presented to this Court were raised. Moreover, as also noted, the North Carolina Supreme Court chose to dismiss Appellant's appeal and deny his Petition for Discretionary Review. It neither heard nor considered the constitutional issues then raised by Appellant, which issues are similar to those now before this Court.

Accordingly, Appellant should not now be allowed to raise novel arguments which no tribunal to date has been asked to consider. Clearly no tribunal has expressly, or even impliedly, considered the validity of the statute at issue. Thus, it is submitted that the Jurisdictional Statement should be dismissed.

---

6. Having failed to raise these arguments in his Brief, Appellant arguably abandoned his right to have them considered before the North Carolina Court of Appeals. See, Rule 28, North Carolina Rules of Appellate Procedure.

B. THE ISSUES NOW RAISED BY APPELLANT IN HIS JURISDICTIONAL STATEMENT HAVE BEEN RENDERED MOOT BY CHANGES IN NORTH CAROLINA LAW.

In his Jurisdictional Statement, Appellant alleges that "the application of NCGS Sec. 50-13.4 (sic) requiring the father to be primarily liable for the support of the minor child violates equal protection of the law." Jurisdictional Statement at 8. Regardless of the constitutional considerations relevant to the interpretation and application of this statute as it is quoted by Appellant in his Jurisdictional Statement, Appellant's argument has now been rendered moot by the revision of this statute.

The North Carolina legislature recently amended N.C. Gen. Stat. Section 50-13.4(b) to make the father and the mother both primarily liable for child support.[7] This statute now reads as follows:

> In the absence of pleading and proof that the circumstances otherwise warrant, the father and the mother shall be primarily liable for the support of a minor child, and any other person, aggency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child....[8]

Given the fact that the substance of Appellant's equal protection argument has been rendered moot, it is submitted that this issue need not and should not now be considered by this Court.[9] Thus, Appellant's Jurisdictional Statement as it relates to this issue should be dismissed.

C. THE ORDER OF THE TRIAL COURT RESTS ON WELL RECOGNIZED PRINCIPLES OF NORTH CAROLINA LAW WHICH ARE NOT VIOLATIVE OF ANY CONSTITUTIONAL IMPERATIVE.

As heretofore noted, at no time did Appellant raise before the trial court or the North Carolina Court of Appeals the issue of the validity of N.C. Gen. Stat. Section 50-13.4. Accordingly, the Order entered by the trial court and the decision of the

---

7. 1981 N.C. Adv. Legis. Serv. Chapter 613, at p. 21.

8. Id.

9. See, Morris v. Weinberger, 410 U.S. 422, 93 S.E. 1408 (1973).

North Carolina Court of Appeals were based upon other precepts of law considered by these courts. It is therefore submitted that the Order of the trial court which is the basis of this appeal rests on an adequate non-federal basis.

A review of the record in this case demonstrates that the trial court did not impose an inequitable or unconstitutionally improper burden on Appellant. The award of reimbursement by the trial court was based upon several principles of law as previously set forth by the North Carolina courts.[10] As the record reflects, the trial court ordered Appellant to pay only his "fair share of support" for the support of his child (Rp 64). This share of support was substantially less than the record evidence of the total monthly needs of the child (Rpp 33-34, 55-56, 64).

In addition, the award of prospective support was only $200 per month, despite evidence that the needs of the child were more than double that amount (Rpp 34-35, 51-56). This award was based not on Appellant's present earnings, but instead on his earning capacity (Rpp 63-65). Such an award was in accordance with numerous decisions of the North Carolina courts allowing an award of child support based on earning capacity rather than actual earnings where the evidence supports a finding that the party required to pay support has failed to exercise his or her capacity to earn because of a disregard of his or her marital obligation to provide reasonable support.[11]

Thus, in entering its Order, the trial court adhered to well recognized principles of North Carolina law, as codified by N.C. Gen. Stat. Section 50-13.4, which require that all of the circumstances demonstrated by the evidence should be considered in imposing an award of child support, both prospective and by way of reimbursement.[12] The North Carolina Supreme Court, in recognizing that all circumstances are decisive in considering matters

---

10. See, Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

11. E.g., Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

12. See, Hicks v. Hicks, supra note 10.

of child support, has also stated in Coble v. Coble, 300 N.C. 708, 711, 268 S.E.2d 185 (1980), "Taken together, these two statutes (N.C. Gen. Stat. Sections 50-13.4(b) and (c)) clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone."

The trial court, in recognizing this "mutuality of obligation," in fact imposed a lesser burden on Appellant than on Appellee for prospective support, and ordered him to pay reimbursement for only three years, despite his complete failure to fulfill his obligation as a parent since 1966 (Rpp 32, 43).[13] Under these circumstances, it is clear that the decision of the trial court rested on an adequate non-federal basis. That is, the trial court ordered both reimbursement and prospective child support after considering all of the circumstances present, and not based upon the sole concept of Appellant's "primary" responsibility to provide such support. Similarly, the decision of the North Carolina Court of Appeals, in affirming the Order entered by the trial court, based its decision upon a review of the principles of North Carolina law enumerated herein, and not upon any concepts considered in Appellant's Jurisdictional Statement. For these reasons, the Jurisdictional Statement should be dismissed.

D. THE CONSTITUTIONAL ISSUES RAISED IN THE JURISDICTIONAL STATEMENT ARE NOT SUBSTANTIAL.

Finally, it is submitted that the issues raised in the Jurisdictional Statement are not substantial, and that for this reason the Jurisdictional Statement should be dismissed. A review of the record and of the law support this position.

There is nothing in N.C. Gen. Stat. Section 50-13.4 which suggests that the classifications, if any, imposed by the language of the statute in force at the time of the entry of the

---

13. The trial court acted properly in ordering reimbursement for only three years, as this was the maximum period as a matter of law for which reimbursement could be ordered. See Tidwell v. Booker, supra, note 10.

trial court's Order present any invidious discrimination subject to attack as violative of the concept of equal protection. Instead, as previously noted, the application of this statute by the North Carolina courts has imposed upon parents a "mutuality of obligation" which, depending upon the circumstances, could require either parent to provide child support.[14]

Moreover, the concept of due process of law lends no support to the arguments contained in the Jurisdictional Statement. The record in this cause clearly establishes that the procedural due process guarantees of the right to notice and a hearing were afforded Appellant. Further, any suggestion that substantive due process guarantees were violated is unfounded for, as noted in the case of State v. Joyner, 286 N.C. 366, 371, 211 S.E.2d 320 (1974), "Substantive due process is a guarantee against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained (citations omitted)." There is nothing in the record to suggest that these precepts were violated by the actions of either the trial court or the North Carolina Court of Appeals.

Thus, Appellant's constitutional contentions are without substance. There is nothing in the record to indicate that Appellant's guarantee of equal protection or due process, either substantive or procedural, have been violated in any way in this cause. Therefore, the Jurisdictional Statement should be dismissed.

III. CONCLUSION

In conclusion, it is submitted that the Jurisdictional Statement should be dismissed on several grounds. First, the issues tendered in the Jurisdictional Statement were not presented to the trial court or the North Carolina Court of Appeals. Accordingly, there has been no decision to date, as required by 28 U.S.C. Section 1257(2), expressly in favor of the validity of N.C. Gen. Stat. Section 50-13.4. Second, this matter has now

---

14. See Coble v. Coble, supra.

been rendered moot by the amendment of this statute. Third, the record in this cause reflects the fact that the Order of the trial court and the decision of the North Carolina Court of Appeals rest on valid non-federal principles of law. Finally, there is no substance to the equal protection and due process arguments being made by Appellant. Thus, Appellee prays that this Court dismiss the Jurisdictional Statement of Appellant, refuse to take jurisdiction of this appeal, and affirm the decision of the North Carolina Court of Appeals.

Respectfully submitted this 11th day of October, 1981.

David B. Hamilton
Attorney for Appellee

OF COUNSEL:

FARRIS, MALLARD & UNDERWOOD, P.A.
1700 Southern National Center
Charlotte, North Carolina 28202
Telephone: 704/372-9110

144PC

NO. ~~8026DC622~~ TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1981

***

the record clearly shows that at no time was any mention made of these issues while the matter was before the trial court. Moreover, while appellant noted constitutional issues as a basis for his appeal to the Court of Appeals, a review of appellant's Brief tendered to the Court of Appeals shows that the issues now being raised were not presented to the Court of Appeals for its consideration and determination.

(3) Pursuant to Rule 16 of the North Carolina Rules of Appellate Procedure, review by the Supreme Court after a determination by the Court of Appeals is to determine whether there is error of law in the decision of the Court of Appeals. Given the fact that appellant's Brief tendered to the Court of Appeals did not raise or discuss the issues now being presented in his Notice of Appeal, it is submitted that the matter should not now be subject to review by the Supreme Court.

PETITION FOR DISCRETIONARY REVIEW

Appellee, responding to appellant's Petition for Discretionary Review, asserts that the North Carolina Supreme Court should decline to certify for review the decision of the Court of Appeals for the following reasons:

(1) As heretofore stated, pursuant to Rule 16 of the North Carolina Rules of Appellate Procedure, it is submitted that the constitutional issues now being raised by appellant should not be subject to review by the Supreme Court.

(2) There is no factual or legal basis to support appellant's claim that this matter falls within the provisions of N. C. Gen. Stat. §7A-31.

Respectfully submitted this 27th day of April, 1981.

David B. Hamilton /s/
David B. Hamilton,
Attorney for Plaintiff-Appellee

OF COUNSEL:

FARRIS, MALLARD & UNDERWOOD, P.A.
1700 Southern National Center
Charlotte, North Carolina 28202
Telephone (704) 372-9110

Best Copy Available

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiff-Appellee's Motion to Dismiss and Response to Petition for Discretionary Review was duly served upon attorney for defendant-appellant, Mr. Rodney S. Toth, at McConnell, Howard, Pruett & Toth, 1404 City National Center, 200 South Tryon Street, Charlotte, North Carolina, 28202, in an envelope, postage prepaid, deposited in a depository under the custody of the United States Post Office Department at Charlotte, North Carolina, this 27th day of April, 1981.

David B. Hamilton /s/

David B. Hamilton

Best Copy Available

NO. 8026DC627 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

SARAH W. STANLEY	)	
	)	
v.	)	From Mecklenburg
	)	
LACEY G. STANLEY, JR.	)	

****

DEFENDANT APPELLANT'S BRIEF
(Filed Jul 17 10:52 AM '80)

****

NO. 8026DC627 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

SARAH W. STANLEY)
)
v.) From Mecklenburg
)
LACEY G. STANLEY, JR.)

****

DEFENDANT APPELLANT'S BRIEF
(Filed Jul 17 10:52 AM '80)

****

I. ARGUMENT

A. THE TRIAL COURT ERRED IN AWARDING CHILD SUPPORT PAYMENTS TO THE PLAINTIFF IN THE AMOUNT OF $200.00 PER MONTH WHEN THERE WAS NO COMPETENT EVIDENCE UPON WHICH TO BASE FINDINGS OF FACT THAT DEFENDANT HAD THE ABILITY TO PAY.

Assignments of Error Nos. 2, 3, 6.
Exceptions Nos. 6 through 15 (R p 78); 29 through 35 (R p 79); 30 through 35 (R p 80); 36 (R p 81).

1. Ability to Pay

The trial court erred in not considering the defendant's ability to pay child support to the plaintiff. The Court of Appeals in the case of HOLT v. HOLT, 29 NC App. 124, 223 SE 2d 542 (1976) held:

> While it is the legal obligation of the father to provide for the support of his minor children, G.S. 50-13.4 and while the welfare of the child is a primary consideration in the matters of custody and maintenance, "yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs." CROSBY v. CROSBY, 272 NC 235, 237,

157 SE 2d 77, 79 (1967); GIBSON v. GIBSON, 24 NC App. 520, 211 SE 2d 522 (1975). In determining the ability of the father to support the child the Court ordinarily should examine the father's present earnings, POWELL v. POWELL, 25 NC App. 695, 214 SE 2d 808 (1975), rather than "select the earnings for a single year in the past and use that as the basis for an award." 29 NC App. at 127, 223 SE2d at 544.

Here, the evidence clearly shows that the defendant at the present time is unemployed (R pp 15, 79) and has no present income despite diligent attempts to obtain employment in his chosen field. A parent who is unable to support his child is not liable. 59 Am. Jur. 2d, PARENT AND CHILD, §54 (1971). In the case at bar a payment of $200.00 per month when the defendant is presently unemployed would require an expenditure in excess of his ability to pay. In holding the trial court in error for requiring a defendant to make payments which exceeded his own necessary expenses, the Supreme Court of North Carolina stated, "The question of the correct amount of alimony and child support is a question of fairness to all parties. We hold that, under present conditions, the payments required of Defendant impose too great a burden and are unfair to him." BEALL v. BEALL, 290 NC 669, 675, 228 SE 2d 407, 413 (1976). In the case at bar defendant's reasonable expenditures amount to $988.40 per month (R p 16). At the present time the defendant appellant is unable to meet his own financial needs, much less the needs of the minor child. In the absence of a finding of fact based upon competent evidence that the defendant has the present ability to pay child support, the Judgment of the trial court ordering him to do so must be reversed.

Neither does the finding of fact that the defendant's failure to exercise sufficient effort to find employment and to exercise his earning capacity is and has been in disregard of his obligation to provide reasonable support for the child justify the conclusion of law that the defendant pay child support in the amount of $200.00 per month. In order to support the findings of fact it must be based on competent evidence. HOLT v. HOLT, supra. The case at bar is devoid of any evidence the defendant intentionally disregarded his duty to find employment. In fact, the defendant has

worked diligently after his last employment in July of 1978 to obtain employment in his field by contacting over 30 major airlines (R p 75), and obtain his Boeing 727 flight certificate. Unfortunately, the economic recession and the defendant's age have precluded him from obtaining employment (R pp 62-63). In short, the trial court did not comply with N.C.G.S. 50-13.4 providing the Court have "due regard to the estates, earnings, accustomed standard of living of the child and the parties, and other facts of the particular case." MONTGOMERY v. MONTGOMERY, 32 NC App. 154, 231 SE 2d 26 (1977).

2. Education

The lower court erred in awarding a decree of child support against the defendant in which part of the minor child's support would go to education in a private school without considering and making findings of facts as to the needs of the child, the supporting spouse's ability to pay, the consent of the father and an Order granting court approval. Ordinarily, education comes within the practical mean of the term "necessaries" which a parent must furnish to his minor children. Lee, NC FAMILY LAW, §237 (1963). The issue here is whether or not the wife may place the minor child in a private school system which was not consented to by the defendant, and for which he has no ability to pay. In North Carolina it is held:

> We are of the opinion that the father, unless his parental authority has been taken away by the court, is the one to decide the extent of and the place of education of his child beyond that which is provided by the public school system. However, where the custody has been taken away from the father by the court, we are of the opinion that the custodian, subject to the approval of the court in cases where the father is required by the court to pay therefor is the one to make such decision. ZANDE v. ZANDE, 3 NC App. 149, 164 SE 2d 523 (1968).

In the case at bar there is no finding of fact approving the education of the minor child in a private school system. Factors considered by the courts in addition to the needs of the child are the ability of

the supporting spouse to pay and the consent by the supporting parent. Thus, in DEGENER v. DEGENER, 478 SW 2d 687 (19__) the court held a father was not liable for the private education of his children where he did not have such private earning capacity to pay, and in MITCHELL v. MITCHELL, 81 Ohio L. Abs. 88, 158 NE 2d 546 (19___), the father could not be compelled to pay for college education of children in the absence of an agreement. In the instant case there is no evidence of an agreement by the defendant to place his child in a private school and certainly none of his ability to pay. The trial court's failure to find facts that the defendant support the private education of his child is in error within the meaning of GS 50-13.4 when requiring the defendant to make monthly child support payments which will contribute to the private education of his child.

B. THE TRIAL COURT ERRED AND VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY AWARDING BACK CHILD SUPPORT PAYMENTS IN THE AMOUNT OF $14,400.00 BASED UPON INSURED MEDICAL EXPENSES AND NO SHOWING OF THE DEFENDANT'S ABILITY TO PAY.

Assignments of Error Nos. 2, 3, 4, 5 and 6.
Exceptions Nos. 5 (R p 77); 6 through 15 (R p 78); 16 through 23 (R p 79); 30 through 35 (R p 80); 36 (R p 81).

The Court made no findings of fact, nor was there competent evidence to indicate the defendant had a present ability to pay child support over the previous three years prior to institution of this action. In an award of child support, the defendant's ability to pay and to reimburse must be considered by the trial court. HOLT v. HOLT, supra; BEALL v. BEALL, supra; HICKS v. HICKS, 34 NC App. 128, 237 SE 2d 307 (1977). Here, as in the case of the $200.00 future child support, there is no competent evidence to show defendant's ability to pay. To the contrary, in 1979 the defendant was unemployed, and in 1978 earned less than $8,000.00 (R p 19).

In addition, this Judgment in the amount of $14,400 ($400.00 x 36 months) cannot be upheld when the trial court also held the defendant liable to pay $200.00 per month in future child support.. These find-

ings of fact and conclusions of law are mutually exclusive. The court considered the same evidence for both awards. Therefore, it is unconstitutional as a violation of due process of law and equal protection of the law to impose upon the defendant an obligation to reimburse the plaintiff for more child support than he would logically have been required to pay as present child support. The only difference in expenditures would possibly have been the medical expenses presented by the plaintiff. However, the plaintiff herself testified that Blue Cross insurance would cover part or some of her medical expenses (R pp 54-55). This is reflected in the court's findings of fact which stated, "Plaintiff has incurred extraordinary medical expenses for the child which expenses in 1979 totalled $4,474.93. A major portion of these medical expenses have been or should be covered by insurance; however, plaintiff has incurred and will incur a great amount of uninsured medical and hospitalization expenses as a result of the illness of the child" (R p 78). The defendant strongly urges that there was incompetent evidence and an improper finding of fact to enable the plaintiff to recover $400.00 per month in back child support due to extraordinary medical expenses, part of which may or have been covered by insurance. Furthermore, the medical expenses were incurred in the year 1979. If the plaintiff is to be reimbursed for child support expenditures, it must be for support actually rendered based upon competent evidence. No evidence is present in the record of actual medical expenses for the years 1977 and 1978. Therefore, the Judgment of the Honorable William G. Jones must be vacated insofar as it awards back child support payments to the plaintiff in the amount of $400.00 per month.

In addition, the court erred by awarding any reimbursement to plaintiff for child support during the previous three years. As provided in N.C.G.S. 50-13.4 and numerous cases cited above, the plaintiff may only recover necessary expenses. However, in the case at bar, the child support for the plaintiff was set at $10.00 per week by a Court Order entered in 1964. Thus, defendant's Motion to Dismiss pursuant to Rule 12(b)(6) should have been allowed in that the plaintiff's proper procedure was to proceed under G.S. §50-13.7, Modification of Order for Child Support or Custody. In any event, there must be a showing of changed circumstances

in order to increase the support of the minor children. WALLER v. WALLER, 20 NC App. 710, 202 SE 2d 791 (1974); CROSBY v. CROSBY, 272 NC 235, 158 SE 2d 77 (1967). In the case at bar there was no showing of changed circumstances or any findings of fact to that effect. Therefore, the original support decree requiring the defendant to pay $40.00 per month in child support governs.

II. STATEMENT OF THE CASE

A. PROCEEDINGS

The plaintiff appellee, Sarah W. Stanley, brought this action against the defendant appellant, Lacey G. Stanley, Jr., for child support and maintenance for their child, Joy Stanley, before the January, 1979, term of the District Court of Mecklenburg County. After a hearing on the matter, the Honorable William G. Jones, Judge Presiding, entered a Judgment in favor of the plaintiff requiring the defendant to pay to the plaintiff the amount of $14,400.00 in back child support, and to begin paying child support in the amount of $200.00 per month, and to grant the plaintiff a security interest in the 1977 Oldsmobile of the defendant. From this Order the defendant appealed.

B. FACTS

The plaintiff and defendant were married on November 30th, 1963 (R p 5), never got along, lived for a while at the home of the plaintiff's parents and separated shortly afterwards. They were the parents of one child to the marriage, Joy Elizabeth Stanley, born September 23rd, 1964 (R p 5). After the separation, the parties appeared at a Court hearing in which the plaintiff did not appear, and the Judge ordered the defendant, Mr. Stanley, to continue to pay $10.00 per week child support (R p 60). Thereafter the defendant left Charlotte and worked at numerous small odd jobs earning from $1.45 to $2.92 per hour (R p 32). After becoming a licensed airplane pilot, the defendant worked for several small freight airlines earning approximately $700.00 per month from 1971 until 1974 and $850.00 per month from 1977 until April 1978 (R p 32). At that time the defendant did obtain a job from April 1978 until July 1978 at a salary of $1500.00 per month, but his job was terminated when the company for which

he worked ran into financial difficulty and the airplane was sold (R p 32). In total, the defendant earned less than $8,000.00 in 1978 (R p 19). Since that time he has attempted to find other employment, but has been prevented because of his age, 36, which is past the cut-off point for most airlines hiring new pilots (R p 63). Since then, the defendant has unsuccessfully attempted to find employment (R pp 63, 72-77; Exhibits B. C. D. E) and is currently receiving no income (R p 15).

The plaintiff alleged she expended over $400.00 per month for the support of the minor child (R p 67), and that she had incurred extensive medical expenses for the year 1979, most of which have been covered by Blue Cross/Blue Shield medical insurance (R p 47). Part of the expense of support was tuition for a private school (R pp 46-49) and payments on a late model Cadillac (R p 53).

The Honorable William G. Jones, Judge presiding, found as a fact that "Plaintiff has incurred extraordinary medical expenses for the child which expenses in 1979 totalled $4,474.93. A major portion of these medical expenses have been or should be covered by insurance; however, plaintiff has incurred and will incur a great amount of uninsured medical and hospitalization expenses as a result of the illness of the child." (R p 78) The Court also found that the plaintiff had expended for the support for the needs of the child for the three year period preceding the initiation of this action an amount in excess of $400.00 per month, and that defendant's fair share of support for that period of time was $400.00 per month (R p 79). The Court went on to find that the child has individual financial needs well in excess of the sum of $200.00 per month, and ordered the defendant to begin paying $200.00 per month to the plaintiff as reasonable child support (R pp 80-81) and granted the plaintiff a security interest in the defendant's 1977 Oldsmobile. This appeal followed:

III. ISSUES

1. Whether or not the trial Court erred in holding the defendant liable to pay child support in the amount of Two Hundred Dollars ($200.00) per month when there was no competent evidence defendant had the

ability to pay? Yes.

2. Whether or not the trial Court erred and violated the defendant's constitutional rights to due process of law and equal protection of the law by awarding back child support payments in the amount of Fourteen Thousand Four Hundred Dollars ($14,400.00) based upon insured medical expenses and without determining the defendant's ability to pay? Yes.

IV. CONCLUSION

In short, the defendant Stanley cannot be required to make future child support payments when there has been no findings of fact of his ability to pay such payments. N.C.G.S. §50-13.4 provides the ability of the father must be taken into consideration. While there was a finding of fact in that defendant disregarded his duty to provide support, no competent evidence was present in the record. The only evidence present was that defendant had contacted numerous airlines in an attempt to gain employment and had actually gone to school to obtain his Boeing 727 certification. Further, the decree of child support requires the defendant to contribute to the support of his minor child who is enrolled in a private school. There is no duty on behalf of the defendant to pay such private schooling in the absence of his ability to pay and his consent. Neither is present from the evidence, and no finding of fact was made to either.

While the Court concluded the defendant's future child support was to be in the amount of Two Hundred Dollars ($200.00) per month, it awarded back child support to the plaintiff in the amount of Four Hundred Dollars ($400.00) per month. As in the case of future child support payments, there was no showing or finding of fact of the defendant's present ability to support at that time. More importantly, the Court considered medical expenses in excess of Four Thousand Dollars ($4,000.00) in determining the amount of back support payments. However, some or all of these medical expenses were to be covered by insurance. In short, no precise evidence was available to the Court upon which to base its findings of fact, and the Order must therefore be reversed. Furthermore, the Court erred in awarding back child support payments in that an Order

providing for support was already in existence at the time this action was commenced, and takes precedence until a finding of fact showing changed circumstances is made, which finding has not been made thus far.

WHEREFORE, the Defendant, Lacy G. Stanley, Jr., prays the North Carolina Court of Appeals reverse the Judgment of the trial Court entered January 29, 1980.

RESPECTFULLY SUBMITTED

McCONNELL, HOWARD, PRUETT & TOTH

s/ Rodney Shelton Toth
Attorney for Appellant
1404 City National Center
200 South Tryon Street
Charlotte, North Carolina 28202
(704) 333-1525

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Brief for Appellant upon the Attorney for the Appellee, by depositing a copy of the same in the United States Mail, postage prepaid addressed to Mr. David B. Hamilton, Attorney at Law, Farris, Mallard & Underwood, 1700 Southern National Center, Charlotte, North Carolina 28202.

This the 16th day of July, 1980.

s/ Rodney Shelton Toth
Attorney for Appellant